(2)

No. 94-1454

In The

Supreme Court of the United States

October Term, 1994

CAROL PLANT,

Petitioner,

vs.

VOUGHT AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard in determining Petitioner did not raise a genuine issue of material fact on either her Title VII or ADEA claim?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard in determining Petitioner did not raise a genuine issue of material fact on her ERISA claim?

LIST OF PARTIES

All parties are set forth in the caption to this matter. Pursuant to Rule 29.1 Respondent's parent corporation, of which it is a wholly owned subsidiary, is Northrup-Grumman Corporation.

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TO THE UNITED STATES SUPREME COURT:

Vought Aircraft Company ("Vought") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued on November 30, 1994 by the United States Court of Appeals for the Fifth Circuit. In support of this request, Vought respectfully shows the Court as follows:

JURISDICTION

This Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on November 30, 1994. The Petitioner's suggestion for rehearing en banc, which was also treated as a petition for panel rehearing, was denied by the Fifth Circuit on January 6, 1995. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254(1) and the Petition was timely filed within ninety days of the denial of the petition for panel rehearing as required by Rule 13.4, Supreme Court Rules.

STATUTES INVOLVED

This case was brought alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"); age discrimination in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-34 ("ADEA"); and deprivation of pension rights in violation of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-461 ("ERISA"). The particular statutory provisions are as follows:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, ...

42 U.S.C. § 2000e-2(a) [Title VII].

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

29 U.S.C. § 623(a) [ADEA].

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

29 U.S.C. § 1140 [ERISA].

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND OPINIONS BELOW

Petitioner's summary of the opinions is essentially correct, but incomplete. Petitioner has failed to present a detailed description supporting the holdings of the Fifth Circuit Court of Appeals, and Vought respectfully urges this Court to review these holdings with Petitioner's statements.

The Fifth Circuit held that Petitioner Carol Plant ("Plant") was unable to raise a genuine issue of material fact on any of her claims; thus, preventing her from

defeating Vought's motion for summary judgment.[1] The Fifth Circuit found that Plant was not able to substantiate her claims that her critical skills were the same as two other employees who were retained during the reduction in force or that Vought failed to follow its policy on reductions in force. In addition, the fact Plant alleged she was qualified to be a secretary, without more, could not be used to raise an issue of discrimination. The mere fact that Vought knew Plant's age and sex also failed to raise a question as to whether she was terminated for a discriminatory reason, particularly since an older female employee, whose age and sex were also known, was retained. Finally, there was no evidence to show a causal relationship between Plant's threat, made two years before her layoff, to file an EEOC charge and her eventual evaluations and layoff.

The Fifth Circuit also held that Plant's ERISA claim was unsubstantiated, particularly since she submitted no evidence of intent to violate ERISA, other than the same alleged facts used for her Title VII and ADEA claims. Therefore, summary judgment was affirmed as to all counts.

B. STATEMENT OF FACTS

While Plant's statement of the facts is essentially correct, because of important omissions, it is incomplete.

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[1] As the Fifth Circuit agreed with the District Court's findings that Petitioner presented no evidence of pretext, it did not determine whether or not Petitioner had established a *prima facie* case of discrimination on any of her claims.

Therefore, Vought submits the following statement which contains those omitted, and important, facts.

It is undisputed that Vought has been suffering and continues to suffer a business down-turn due to the decreasing number of orders for commercial and military aircraft. (R. Vol. I at 63, ¶ 6; 107-08, ¶ 3). These business conditions required that employees be laid off and 401 salaried employees were laid off between November of 1992 and January of 1993. (*Id.* 64, 109, ¶ 7). Vought utilized a specific procedure to determine which salaried employees would be laid off, which was set forth in company directive 214.1. (*Id.* at 107-08, ¶ 3; 112-22). The criteria considered under this company directive included "[p]erformance, seniority and critical skills". (*Id.* at 108, ¶ 4; 112, ¶ 1.6). Seniority was the governing factor only when "performance and critical skills are essentially equal to – [o]ther department employees in the same classification, [o]ther employees in the same job ladder". (*Id.*). If an employee is identified to be laid off, Vought attempts to find a position for the employee. (*Id.* at 108, ¶ 4; 112, ¶ 1.7). If no other position can be found before an employee is laid off, the Vice President of Human Resources must approve the layoff. (*Id.* at 109, ¶ 6; 112, ¶ 1.1). If the employee has between fifteen and twenty years seniority, the cognizant Vice President must also concur. (*Id.*). If the employee has more than twenty years seniority, the President of Vought must concur with the layoff before it is effective. (*Id.*). As Plant had more than twenty years seniority, (*Id.* at 63), before she could be laid off, the lay off would have to be approved by all the above individuals. This policy was followed, without exception, for the hundreds of layoffs of management

personnel which occurred. In addition, there is no evidence that any particular group, whether based on age, sex, or other protected status, was adversely impacted by application of this policy.

Plant held numerous positions with Vought throughout her career, and in 1990 she was temporarily transferred to a secretarial pool, from which she applied for other, regular positions in the company. (*Id.* at 64-65, ¶ 10). On May 27, 1991, she was able to transfer to a Planning Aide position, a salaried position in which she remained until she was laid off in November of 1992. (*Id.* at 63, ¶ 4).

Plant's particular Planning Aide assignment was in Personnel Administration for the Overhead Planning and Control Department. (*Id.* at 62-63, ¶ 3). It is undisputed that there was only one other individual in that same position, M. E. McCauley ("McCauley"), who is also a female and who is older than Plant. (*Id.*). Because of the lack of work, it became necessary to eliminate one of these positions. (*Id.* at 63, ¶ 6). Pursuant to the directive on layoffs, a stacking was made of both Plant and McCauley in order to compare performance, seniority and critical skills. Plant did have more seniority than McCauley, but her performance and critical skills were not as good as McCauley's. (*Id.* at 64, ¶ 7; 69-96). In particular, in her performance evaluations, completed not by McCauley but by Plant's supervisor, Plant was marked down in attendance and communication skills, and she had specific problems in other areas as well. (*Id.* at 69-77). In particular, in 1992 Plant was late to work on 81 separate occasions. (*Id.* at 64, ¶ 8). McCauley was not marked

down in any areas, and she did not have the same attendance problems that Plant had. (*Id.* at 78-96). Therefore, it is clear McCauley's performance was better than Plant's and Plant was therefore rated lower than McCauley. As such, consideration of the relative seniority of the two individuals was not relevant to the decision as to which employee would be laid off.

Finding an open position for which Plant was qualified was an almost impossible task as there were very few open positions because of the number of layoffs. (*Id.* at 64, ¶ 10). Vought did consider whether to offer Plant a secretarial position, which she had held in the past. (*Id.* at 64-65, ¶ 10). However, her most recent secretarial assignment, in 1990, was not successful as during that assignment it became apparent that Plant did not demonstrate the computer skills necessary to perform as a secretary, she did not learn those skills, nor did she have the attitude necessary to learn the job. Therefore it was determined that there was no position for which she was qualified. (*Id.* at 64-65, ¶ 10; 103-04).

Plant alleges she could have taken the job performed by Mr. James Hendricks, a younger, black male employee. Despite Plant's contentions to the contrary, that position was not the same as the one she held previously. Rather, it was a higher level position and required a higher degree of skill, which Plant did not possess. (*Id.* at 65, ¶ 11; 152-53; Vol. II at 167, 176, 328-33).[2] No other positions were available for

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[2] In addition, as it was a higher rated position there were greater performance expectations for the position. Therefore, employees' performance in Hendricks' and Plant's positions could not be compared as to do so was like comparing apples and oranges.

which Plant was qualified. (Vol. I at 66, ¶ 15). Since she was the lowest ranked employee, pursuant to the company directive, Plant was selected for layoff over McCauley, the older female employee, who was retained. (*Id.* at 64, ¶ 9). Vought complied with all provisions of company directive 214.1, including determining whether there were other jobs for which Plant was qualified, and obtaining approval of all necessary individuals, including the President of Vought before determining that the layoff of Plant was appropriate. (*Id.* at 66, ¶ 15; 105-06). Plant was informed of her layoff on November 20, 1992, but her seniority entitled her to salary continuance through January 29, 1993. (*Id.* at 109, ¶ 7). Throughout the company, **no exceptions** were made to the order of layoff for the 401 salaried employees who were laid off. (*Id.*).

As Plant had more than twenty years seniority, she was vested in the pension plan and she can elect to begin receiving her retirement benefits when she reaches age 65. (*Id.* at 109-10, ¶ 8). Plant would not be eligible, however, for an early retirement benefit as she is no longer an employee. One of the early retirement benefits offered at Vought is the "Magic 85" program. (*Id.*) Under "Magic 85", an employee may begin receiving early retirement benefits when he or she reaches age 55 and the total of his or her age plus years of seniority is at least 85. (*Id.*). Plant was approximately seven years away from qualifying for "Magic 85". (*Id.*). She would have been eligible only if she remained employed until January 1, 2001. (*Id.*).

Finally, Plant testified that her actual complaint about her layoff and termination was that she was the victim of performance and seniority discrimination. (*Id.* at 154, 156, 161-64).

SUMMARY OF ARGUMENT

The Fifth Circuit's determination that the District Court correctly granted summary judgment on all of Plant's claims does not warrant review by this Court because the decision correctly applies this Court's holding in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993). In *St. Mary's*, this Court stressed that in order to prevail on any claim of discrimination, a plaintiff must be able to point to evidence from which it can be inferred that the employer acted with a discriminatory intent. It is not sufficient merely to call the employer's decision into question through speculation or to demonstrate the employer's stated reason for the action is false. The discrimination statutes require that there be evidence to demonstrate that the employer took the action in order to discriminate against the individual in violation of federal law. As there was no evidence from which a factfinder could reasonably infer that Vought acted out of desire to discriminate against Plant on account of her age or sex, summary judgment was properly granted to Vought.

Likewise, the Fifth Circuit correctly held that there was a similar lack of evidence on Plant's claim that she was laid off in order to prevent her from taking early retirement seven years hence. Once again, there is no evidence from which a factfinder could reasonably infer that Vought possessed any intent to deny Plant any rights under ERISA and summary judgment was appropriate.

ARGUMENTS SUPPORTING DENIAL OF THE PETITION

A. THE DECISION OF THE FIFTH CIRCUIT IS CORRECT AS PLANT PRESENTED NO EVIDENCE FROM WHICH A FACTFINDER COULD INFER VOUGHT DISCRIMINATED AGAINST HER ON ACCOUNT OF EITHER HER AGE OR SEX.

Plant's request to this Court to exercise jurisdiction is based solely on her argument that the decision of the Fifth Circuit Court of Appeals is contrary to three decisions of this Court in *St. Mary's, supra, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973). That request, however, is based solely upon speculations which she "argues" satisfy her burden to raise a genuine material fact concerning the existence of pretext. As in the two courts below, she once again fails to identify any evidence which would support a finding of discrimination. The Fifth Circuit's application of *St. Mary's* does not require nor warrant review by this Court.

This Court's most recent examination of the burdens of production and persuasion in discrimination cases is set forth in *St. Mary's, supra.*[3] As in the instant case, the plaintiff in *St. Mary's* did not challenge the finding that the employer met its burden to articulate a legitimate, non-discriminatory reason for its actions. The only issue was whether, by demonstrating the employer's reason was false, the plaintiff proved pretext. Again, as in the instant case, no such showing was made. Noting that

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[3] Vought does not dispute the basic proof formula set forth in Plant's Petition.

liability for discrimination is dependent upon a finding of intent, the Court stated:

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

___ U.S. at ___, 113 S. Ct. at 2751 (emphasis in original). Therefore, if a plaintiff cannot point to any facts which could give rise to an inference of discrimination, there can be no violation of the law.

Plant believes she has raised a genuine issue of material fact on pretext by arguing the following: 1) she was entitled to her last position on the basis of her seniority; 2) she was qualified for an available scheduling position which was given to a younger male; and, 3) there was a secretarial position for which she was qualified. Each of these propositions, as stressed in Plant's own Petition, is nothing more than her "argument" that discrimination is the real reason that she was laid off.

Plant alleges that Vought improperly relied upon a co-worker's record of Plant's absences to determine she

should be ranked lower than the co-worker, who was also a female and who was older than Plant.[4] Plant's entire argument is based upon her allegation that the attendance record was false. As clearly set forth in *St. Mary's*, even if the record were shown to be false, it would not require that a finding of discriminatory intent be made. Moreover, the co-worker who allegedly credited the false record was not involved in the decision to lay off Plant. Therefore, the Court of Appeals correctly found this alleged evidence to be insufficient to raise even a hint of discrimination, let alone a genuine issue of material fact.

Second, Plant also argues it is her opinion that she was qualified for and able to do the higher labor grade position which was given to Hendricks. Once again, however, she presented no evidence that she was indeed qualified. Moreover, even if she were able to show she was qualified, the mere fact that another individual, who is male, received the position is not sufficient to raise the spectre of intentional discrimination. At best, it may create the existence of a *prima facie* case of discrimination, which is rebutted by Vought's legitimate non-discriminatory reason – that Hendricks possessed better qualifications. As Plant has acknowledged that Vought did indeed articulate a legitimate non-discriminatory reason for its action, she must come forward with some fact from which a factfinder could reasonably conclude that Hendricks was actually chosen because he is a male. Plant's

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[4] It is difficult to even conceive how Plant could establish a *prima facie* case of either age or sex discrimination, since the individual who allegedly received the preferential treatment was older and female.

only "fact" is that it occurred, which constitutes no evidence whatsoever.

Third, Plant also argues she should have been given a secretarial position. Initially, it should be noted that she never identified a specific open position which she could have filled. Moreover, Vought stated that her previous performance in the secretarial pool demonstrated Vought did not consider her qualified for a secretarial position. Plant does not dispute that this preferred evidence satisfied Vought's burden of articulating a legitimate, nondiscriminatory reason for its actions. Once again, Plant's sole argument on pretext is that she disagrees with Vought's opinion of her skills and abilities; therefore, Vought's reason must, in actuality, be false. Absent any other evidence, as with her other arguments, this is insufficient to raise a genuine issue of pretext. Therefore, the Fifth Circuit correctly applied *St. Mary's* to this case.

Finally, Plant alleges that two years before her layoff and before she received the Planning Aide position, she raised the possibility of filing an EEOC charge. Nothing adverse occurred, until an older female employee was selected for retention over Plant. She failed to introduce any evidence of a causal connection between her alleged threat and her eventual layoff. Once again, there is nothing from which a factfinder could possibly infer Vought desired to discriminate against Plant on account of her age and sex, thereby confirming the correctness of the Appellate decision.

Plant's request for review is based upon a misinterpretation of this Court's holding in *St. Mary's* and Rule

56 of the Federal Rules of Civil Procedure.[5] Plant argues the Fifth Circuit misapplied the law as it found no evidence to support Plant's allegation that she was capable of doing the job given to Hendricks. Plant believes that if she would have created a fact issue concerning her qualifications and Hendricks, based solely upon her personal opinion, she could overcome summary judgment. She also alleges the Fifth Circuit erred in finding that merely because Plant had worked as a secretary before did not give rise to an inference that she was not offered a secretarial position because of her sex or age. Even if a fact issue were raised, it is on an issue not related to whether there is even a hint from which it could reasonably be inferred that Plant was the victim of age or sex discrimination. Plant alleges the Court of Appeals incorrectly forced her to bear the ultimate burden and prove her case in response to a motion for summary judgment, when in actuality the Fifth Circuit was only following this Court's precedent and requiring that there be at least some inference of discrimination which could create an issue of fact to be decided by a factfinder. Moreover, Plant's own

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[5] Plant argues review is required because the **District Court** improperly applied *St. Mary's*, *Burdine* and *McDonnell Douglas*. However, since the Court of Appeals reviewed the matter *de novo* and issued its own, separate opinion, what the District Court may or may not have found should serve as no basis for review by this Court. Rather, the only focus should be on the decision of the Fifth Circuit Court of Appeals. Moreover, the cases with which Plant alleges the Fifth Circuit decision conflicts were rendered by other Courts of Appeals, not by this Court, were rendered prior to the decision in *St. Mary's*, and require a lesser showing to show discrimination than articulated by this Court.

inferences and findings were that she was actually discriminated against on account of her performance and seniority.

Rule 56 provides when there are no genuine issues of material fact and when the moving party should be granted judgment as a matter of law, summary judgment is appropriate. In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986) this Court detailed what type of evidence was sufficient to create a genuine issue of material fact sufficient to defeat a motion for summary judgment. While respondents in that case alleged numerous conspiracies, only one could have possibly demonstrated there was a violation of antitrust law, which was not sufficient:

> Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioner's summary judgment motion.

Id. In the instant case, none of the alleged issues of fact concerning the difference of opinion between Vought and Plant concerning Plant's performance is sufficient to demonstrate the existence of a discriminatory motive. What the facts did show is that an older female employee was selected for retention over Plant.

In addition to demonstrating an issue relevant to the ultimate outcome exists, this Court has also pointed out that the issue must be "genuine":

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the

> language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*"

Id. at 587, 106 S. Ct. at 1356 (footnote omitted; emphasis in original). Absent such evidence, summary judgment should be granted. Further explanation of what creates issues of fact sufficient to overcome a summary judgment motion was provided in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2612 (1986). It is not sufficient that the non-moving party present just a scintilla of evidence. Rather there must be sufficient evidence presented in response to a motion for summary judgment from which a factfinder could reasonably find for the non-moving party. In the instant case, that would require some proof from which it could be found that Plant was the victim of age or sex discrimination. Absent evidence of discriminatory intent, as is the case herein, there is no evidence from which a factfinder could find for the nonmovant, and summary judgment must be granted.

Additional guidance was provided by this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986), wherein the Court required that, in order to defeat a motion for summary judgment, a nonmovant must make a sufficient showing on an essential element of the claim on which that party bears the burden of proof. In the instant case, there are no facts which would indicate Plant could bear the ultimate burden of proof to demonstrate that Vought intended to discriminate against her on account of either her age or sex. The only issue which arguably could exist is whether Plant or Vought was correct concerning the opinion of Plant's performance. Such an issue, however, is neither genuine

nor could it be used to satisfy Plant's ultimate burden of proving discriminatory intent. As there was no such evidence in the instant case creating a genuine issue of material fact which could lead a reasonable factfinder to conclude that there has been a violation of either Title VII or the ADEA, the Court of Appeals correctly applied this Court's interpretation regarding Rule 56. Thus, there is no basis for review of the Fifth Circuit's decision.

B. THE DECISION OF THE FIFTH CIRCUIT ON PLANT'S ERISA CLAIM IS ALSO CORRECT AS THERE IS NO EVIDENCE FROM WHICH A FACTFINDER COULD INFER VOUGHT INTENDED TO PREVENT PLANT FROM EXERCISING HER STATUTORY RIGHTS.

The Fifth Circuit also determined that Plant failed to carry her burden sufficient to demonstrate that Vought intended to deprive her of the ability to take early retirement in 2001 by laying her off in 1992. Section 510 of ERISA, which Plant alleges was violated, makes it unlawful:

> [F]or any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140. Plant claims only that Vought intended to interfere with her possible attainment of the right to take early retirement in 2001. However, Plant relies only

on the same evidence she alleges demonstrates a fact-finder could find both age and sex discrimination and presents no specific evidence from which it could be inferred that Vought's intention was to violate ERISA.

Plant cites no authority in her Petition to demonstrate that there is any decision of this Court with which the Fifth Circuit's decision is in conflict. In fact, she cites no Court of Appeals' decision with which the Fifth Circuit's decision is in conflict, or any authority that would indicate the Fifth Circuit is incorrect. The Fifth Circuit, correctly applying Section 510, requires that a plaintiff prove that the employer acted with the specific intent to violate ERISA in order to prevail. *See Unida v. Levi Strauss & Co.*, 986 F.2d 970, 979-80 (1993); *Simmons v. Wilcox*, 911 F.2d 1077, 1082 (5th Cir. 1990).[6] As set forth above, under *Matsushita, Anderson, supra* and *Celotex, supra*, this Court requires that there be evidence sufficient to demonstrate intent, which is clearly lacking. Plant's only "evidence" is her argument that Vought intended to violate her rights, supported by nothing other than her own personal belief. As such beliefs are not competent evidence of intent, she has failed to present sufficient evidence to raise a genuine issue of material fact and Vought was properly granted judgment as a matter of law. Since the Fifth Circuit did no more than apply this Court's decisions in determining that summary judgment was warranted, there is no purpose to be served by this Court's review of that decision.

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[6] Plant does not challenge the Fifth Circuit's requirement that intent be demonstrated.

CONCLUSION

Plant has not identified any provision of the Fifth Circuit's decision affirming the grant of summary judgment which conflicts with a decision of this Court. Were her position adopted such that personal beliefs and differences of opinion were sufficient to withstand summary judgment, that position would result in a reversal of all of this Court's precedent relating to the interpretation of Rule 56 and would result in an effective repeal of Rule 56. As there is no basis for considering such a result, and because there are no issues of precedential value, this case does not warrant review by this Court. For the reasons set forth above, Vought respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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